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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 732

H. J. JENKINS,

Petitioner,

vs.

JAMES M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION.

PETITIONER'S REPLY BRIEF.

HARRY G. WALTNER, JR.,
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Respondents' position in this case is technical to the extreme. In the first place, a very narrow construction is placed on the term "notified" and pyramided on top of that is another technicality, to-wit, that the petition specifically pleaded negligence of the engineer in failing to put on the emergency after being "notified" (in such narrow sense) and petitioner therefore cannot recover because respondents were negligent in failing to hear or understand the warning or notice, although the evidence established a cause of action for which recovery should be permitted. Before considering the above, we would point

out error in respondents' argument in that petitioner offered instructions on more than one charge of negligence (R. 122) specifically contending the engineer failed to have his train under control as he passed through the yard limits. The court's refusal to give this instruction cannot be charged to petitioner and therefore respondents' arguments on pages 7 and 8 are not in order.

Concerning the first condition, it is quite evident from the petition, the evidence and the instructions, as well as from the very nature of the case that the term "notify" as used in the petition and in the instructions was not used in its technical legal sense but in its general and ordinary accepted sense. The petitioner herein alleged in his petition that he "warned the said Howard Reese, the engineer of No. 630 upon which the plaintiff was riding to put on the emergency brake" (R. 6) and the respondents herein in filing their answer used the terms "warned" and "notify" as interchangeable expressions, alleging that it was petitioner's duty to "warn and notify the engineer of his said train" (R. 11) and again in the same instrument the respondents herein alleged that petitioner "negligently failed to timely notify the engineer" (R. 11), and in the next paragraph of said answer asserted petitioner negligent because "plaintiff negligently failed and omitted to warn or notify the engineer" (R. 11). Throughout instructions, both on the part of the petitioner and the respondents, the term "notice" or "notify" was used interchangeably with the words "signal" and "warned". The act is described in petitioner's Instruction No. 2 (R. 119) as "was notified" and "signal". In respondents' instructions it was referred to as follows: Instruction "C" (R. 123) "warning"; Instruction "D" (R. 123) "to warn" and "to have warned or notified"; Instruction "F" (R. 124) "to notify" and (R. 125) "to have warned or notified".

Throughout both the pleadings and the instructions given in this case, both parties to this action have used the term "notify" as interchangeable with the word "warn" or "signal" and certainly if there is any special significance to be attached to the use of a word, it cannot be carelessly used in such a manner as to entirely contradict the special significance intended. In its commonly accepted sense, notify, being the verb of the noun, notice, cannot mean anything other than to give notice and when notice is given, there is absolutely no common understanding that an assurance of understanding or comprehension is intended. Probably the most common use of the term "notify" is in everyday life attached to the obligation of a tenant to "notify" his landlord of intention to vacate premises and in such circumstances the tenant does not in any way insure the understanding of the notice which has been given to the landlord. The tenant makes the statement or declaration and the landlord fails to understand only at his own risk. The use of the word "notice" as an assurance of understanding is obsolete. Funk's Dictionary defines this to be, "intelligence by whatever means communicated; * * * an order communicated to one; * * * obsolete: (a) knowledge"; in Webster's the word "notice" will be found to mean: "Act of remarking or observing"; also will be found "Obs. a. Knowledge" and the verb "notify" is defined "to give notice of; to declare"; "remark" and "advice" are synonyms. All that can be required of a person giving notice or required to notify is that the notice or notification be couched in terms appropriate for the purpose, and the Supreme Court of Missouri in its opinion stated that this had been done (R. 137). Failure to understand is the risk which the recipient must run, the notice not being equivalent to actual knowledge. The Supreme Court of Alabama in the case of *Southern Railway Co.*

v. *Bunt*, 32 So. 507, 131 Ala. 519, in considering an instruction averred "the engineer of said engine wantonly or intentionally caused or allowed said engine to propel said car against said other car with too great force with knowledge or notice that plaintiff was between said cars, and in great danger from said car being propelled against said other car with such force" stated (So. 508, Ala. 594):

> "Wantonness in the doing of or the omission to do an act, the probable result of which will be to injure, can only be predicated upon actual knowledge of existing conditions attending the act or omission which caused the injury. Notice in such cases is not the equivalent of actual knowledge."

Again in *Osborne* v. *Alabama Steel & Wire Co.*, 135 Ala. 571, 577, that court stated, in connection with notice of defects:

> "The averment of the plea being knowledge or notice to the intestate being in the alternative, is no stronger than would be an averment of notice alone, and notice is not the equivalent of knowledge. Notice may consist merely of information as to collateral facts sufficient to incite inquiry and which an ordinarily prudent person would follow to a knowledge of the main fact."

That throughout the case "notify" was considered as but the verb of "notice" is made apparent from these two lines of the court's opinion (R. 137).

> "Plaintiff's case was submitted on the theory that the engineer failed to exercise ordinary care to stop after *notice* by plaintiff of the danger ahead. In the situation the decisive question on the demurrer to the evidence is: Is there substantial evidence that plaintiff *notified* the engineer to go into emergency?"

Throughout the instant case, the terms "notice" and "notify" are used constantly and interchangeably with

"warn", "signal" and "declare". This is particularly evident from the instructions and most certainly it is reasonable to assume that the word "notify" as appearing in one portion of the petition must be read in the light of the other averments and allegations of the petition. Likewise, throughout the instructions and the passing upon demurrers, a reasonable and ordinary and common construction must be given to these words. Petitioner respectfully suggests that at all times it was petitioner's theory, joined in by respondents that the word "notify" or "notice" was to be given no special significance and no other theory on behalf of respondents is evident at any point in the trial of the case but for the first time this narrow and unusual construction of the term and of the requirements of the law was urged at the hearing before the Supreme Court of Missouri. We urge that the word or words should be construed to be used in the light of the legal requirements made upon petitioner to prove his case. If two constructions, both of which are reasonable, can be given a word, most certainly it is fair and reasonable to construe such word in the light of the legal demands and requirements. All that can be fairly required of petitioner in the trial court or thereafter, was to establish negligent action by respondents' engineer, either by failing to apply brakes or hear or understand the warning. Failure to act after an adequate notice or warning had been given in a reasonable manner was the real charge which petitioner made against respondents, and it was well understood by those trying the case. It was immaterial why the engineer failed to act. Such being the case, these terms "notice" and "notify" should be reasonably construed as meaning warn or signal. Had there been any indication in the trial of this case of respondents' position on the question of the construction of the word "notify", petitioner herein would have asked leave to amend his petition so as to con-

form to the proof, and the trial court, following well established precedent, would have granted petitioner's request.

Parker v. *St. Louis San Francisco Ry. Co.*, 41 S. W. (2) 386 (not officially reported);

Fairgrieve v. *City of Moberly*, 39 Mo. App. 31 (not otherwise reported);

McDonald v. *St. Louis & S. F. R. Co.*, 146 S. W. 83, 165 Mo. App. 75;

Waverly Timber & Iron Co. v. *St. Louis Cooperage Co.*, 20 S. W. 566, 112 Mo. 383.

Respondents' endeavor in the reply brief to indicate that because of a technicality in pleading, this father of four children now wholly unable to support them because of injuries received in respondents' service should be deprived of a cause of action which they do not deny exists. They allege that there is a deviation between petitioner's pleading in the trial court, on the one hand, and the evidence in the case and the instructions given on the other. *Thus, endeavoring to withdraw from this Court, jurisdiction to pass upon the case as involving a Federal question.* They cannot be successful in this contention for as shown by cases cited in petitioner's original brief this Court will look behind such subterfuge and see that substantial justice is done. However, granting for the moment that there might be a variance between the charge to the jury in the instructions and the allegations of negligence in the petition, the Supreme Court should under any circumstances have remanded the case to the trial court for new trial. The failure of the Supreme Court to so remand such case fully sustains petitioner's position that the Missouri Supreme Court decided that under the law, it was essential that petitioner prove an understanding of the warning to sustain any cause of action against respondents and as the court thought the evidence in the case indicated that petitioner could not prove actual

understanding by respondents' engineer, the Missouri Supreme Court reversed the case outright. Had the Supreme Court of Missouri had the correct view as to the law, to-wit, that plaintiff had a cause of action by proving simply the giving of the notice irrespective of the understanding, *i. e.*, that respondents were liable for the engineer's negligent failure to hear or understand, the Supreme Court would have remanded the cause so as to permit a re-trial, if such were necessary, after appropriate amendment to the petition, if such were necessary. The duty of the Appellate Court to remand under such circumstances is well established in Missouri Law. *Finnegan* v. *Mo. Pac. R. Co.*, 149 S. W. 612, 244 Mo. 608. Unless the appellate court is absolutely convinced without doubt that plaintiff cannot produce facts justifying the recovery the cause should be remanded. *Hamilton* v. *Frisco*, 279 S. W. 177, 181 (Mo. App.). Even though it be not suggested that evidence can be produced establishing the right to recovery, nevertheless the cause may be remanded. *Cole* v. *Kansas City So. Ry. Co.*, 268 S. W. 886, 887 (Mo. App.). It is quite certain that upon a retrial positive evidence can be produced to sustain petitioner's cause of action. See affidavit (R. 176-179). That petitioner should be permitted a re-trial after such amendments to the petition as may be necessary, cannot be denied in view of the very recent decision of the Supreme Court of Missouri in *Jensen* v. *Wilson Township, Gentry County*, 145 (2d) S. W. 372 (Not yet officially reported). In this case a speculator in township warrants had instituted an action on the warrants to recover the face thereof with interest from the township. No right to proceed in *quantum meruit* was pleaded in the petition. The Supreme Court determined that the plaintiff had no right to recover on the warrants but added:

"This court has frequently held, when there is evidence tending to show plaintiff has rights growing out

> of the transaction involved, but has misconceived the remedy, an appellate court has discretion in the matter, and may remand the cause to permit the petition to be amended and a re-trial of the cause."

and reversed the cause with directions "to allow plaintiff to amend his petition, if he so desires, and to try the cause anew in conformity with the views herein expressed * * *."

It is inconceivable that the Supreme Court of Missouri would remand a cause giving a speculator in county warrants "a second bite at the cherry" and yet deny to petitioner, the mainstay in a family of six now physically handicapped, an opportunity to present to another jury the negligence of the respondents herein to the end that he might obtain fully and completely the remedy and relief which the Acts of Congress have granted to him. This can only be explained by admission of petitioner's fundamental contention that the Supreme Court of Missouri has entirely misconceived the basic requirements to sustain a cause of action under the Federal Employers' Liability Act, and petitioner is confident that this Court will by its decision in this case pronounce in unequivocal terms the error of the Supreme Court of Missouri in its decision herein by quashing the opinion which that court has rendered in this cause.

Respectfully submitted,

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